No. 21754

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21754

UNITED STATES OF AMERICA, Appellant

v.

EDISON R. NOGUEIRA, ET AL., Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLANT

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WM. MATTHEW BYRNE, JR.,
United States Attorney,
Los Angeles, California 90012.

ERNESTINE TOLIN,
Assistant United States Attorney,
Los Angeles, California 90012.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C. 20530.

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OPINION BELOW

The court's memorandum relating to certain motions (R. 52-53) is not reported, nor are its conclusions of law stating the reasons for its action (R. 153).

JURISDICTION

The district court had jurisdiction of this suit for ejectment and other relief instituted by the United States, under 28 U.S.C. sec. 1345. The judgment of the district court dismissing the case was filed on November 16, 1966 (R. 157-158). Notice of appeal was filed on January 9, 1967 (R. 160-161). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the district court lacked jurisdiction of a suit to eject defendants from property of the United States and to recover trespass damages because of the assertion of a mining claim, an earlier mining claim to the same property having been rejected by the Department of the Interior, especially when the facts indicated that the claim was not located or continued for a bona fide purpose of developing a profitable mine and the defendants were, by their own admissions, using the property for purposes other than mining.

STATUTES INVOLVED

Section 3 of the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. sec. 26, provides in part:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, * * *.

Section 4(a) of the Act of July 25, 1955, 69 Stat. 368, 30 U.S.C. sec. 612, provides:

> Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

STATEMENT

This is an appeal from a dismissal, without trial, of a complaint seeking to eject defendants and to recover damages because of trespass upon land and occupation of a residence in the Cleveland National Forest. The dismissal was on the ground that the validity of a mining claim under which defendants claimed rights must first be adjudicated by the Department of the Interior. The facts, as they appear from the pleadings, depositions and affidavits in connection with a motion for summary judgment, may be summarized as follows:

The Grape Vine Placer Mining Claim was located in 1903 and 1945 on lands now within the Cleveland National Forest. An application for a patent, filed by Mary A. Mattey, widow (after 1946) of the original locator, was rejected after Interior Department proceedings by opinion dated February 29, 1960. The

ground was that the material involved, shale used for the manufacture of sewer pipe, is a common clay not subject to location under the mining laws (R. 88-93).

Mrs. Mattey lived with her son, Robert, for many years prior to 1966.[1/] During this time, Robert, who worked for Walt Disney motion pictures in 1966, lived in West Los Angeles and Sunland, California (R. Dep. 3). He said that in 1960, after the Interior Department decision, the family had a "lot of investment" in this claim and that he "had to do something or just quit" (R. Dep. 23). As a consequence, on May 1, 1961, Mary executed a quitclaim deed to Robert of the lot known as the Grape Vine Placer Mining Claim (R. 75). Under date of May 8, 1961, Robert leased to Maria Nogueira 'that certain unpatented mining claim," with an option to the lessee to purchase on 30 days' notice (R. 70-73). On May 18, 1961, there was filed by Robert for recording a placer location, purportedly of fire clay, located on May 1, with date of discovery May 6, the location notice being verified May 10 (R. 69). Robert said

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1/ Many of the facts stated appear from the depositions of Robert A. Mattey ("R. Dep."), Edison Nogueira ("E. Dep.") and Maria Nogueira ("M. Dep."), which were considered in connection with the motion for summary judgment and copies of which have been filed with the Clerk.

he had known for years and years where the fire clay was and that in 1961 he removed seven or eight cubic feet of material, and later removed a few tons (R. Dep. 14-15). He also said the $200 work on the location notice included his labor (R. 53-54).

Except for such minor excavations, there has been no mining from the property since at least 1960. Instead, the Nogueiras have used the land as a residence. Edison Nogueira retired as consul for the Brazilian government after having worked in that occupation for some 25 years in various parts of the world (E. Dep. 5, 13). He is not at the claim much of the year, spending time traveling in the public relations business (E. Dep. 13-14). His wife stays at the claim when he is away (E. Dep. 14-16). Before coming to the property, he lived in Riverside, California, and found Robert Mattey through a real estate saleswoman (E. Dep. 21-24, 25-26). He said his daughter, Maria Nogueira, had her first citizenship papers and she took the lease because he could not qualify (E. Dep. 24-25).

Maria Nogueira, who was born in Brazil and who had last worked in 1961, kept house with her mother (M. Dep. 3, 6-7). She said she met Mattey because "We was looking for a

place to live close to the Corona Area" (M. Dep. 11). She agreed there had been no mining since 1961 (M. Dep. 33).

By letter of October 30, 1962, the Forest Service requested removal by January 30, 1963 (Ex. 1 to M. Dep.). Under date of December 18, 1963, Maria filed an application for five acres of the Grape Vine Mining Claim under the Act of October 23, 1962 (Ex. 2 to M. Dep.). That application stated that the claim had been originally located in 1903, again in 1945, "lastly on May 10, 1961 by Robert A. Mattey"; that major improvements were completed in 1949-1951 and "[m]ajor remodeling and some additions to the residence were completed in 1961, 1962"; that the mining claim "was determined to be invalid on February 29, 1960"; and that "The said claim was the permanent home of Mary A. Mattey's husband and the father of Robert A. Mattey and it was the vacation home of Robert A. Mattey. It was on October 23, 1962 the permanent home of the claimant herein." This application was rejected on the ground that it failed to qualify under the 1962 statute. Under date of March 16, 1964, Robert Mattey executed a quit-claim deed to Maria of "The GRAPEVINE Placer Mining Claim located May 1st, 1961" (R. 74).

The Nogueiras having refused to move, this suit was instituted by complaint filed February 2, 1965 (R. 1-4). An answer was filed and also a counterclaim, which alleged that defendants "have maintained and occupied the premises as their permanent home and residence since May 8, 1961," and the defendants were entitled to relief under the 1962 Act (R. 11-15). The United States moved to strike the counterclaim for lack of consent to suit (R. 20) and, besides opposing, defendants moved to amend their answer by asserting a fourth affirmative defense seeking judicial review of the decision rejecting the original Grape Vine Claim (R. 20-33).

After hearing, the district court, on February 21, 1966, filed a memorandum stating that the case was not ripe for action by the court because the Department had not held the 1961 claim to be invalid and that such an adjudication was "a preliminary prerequisite to jurisdiction by any court on the validity of a mining claim [which] was settled in Best, et al. v. Humboldt Placer Mining Co., et al., 1963, 371 U.S. 334." Accordingly, the court suggested that defendants move for summary judgment of dismissal (R. 52-53). The defendants moved for summary judgment (R. 56-75). The United

States opposed (R. 77-97). An order was entered March 21, 1966, that depositions should be taken and that they should be considered in connection with the motion (R. 110-111). After additional briefing, the court entered findings of fact that since May 1961 defendants have been in possession of the Grape Vine Mining Claim, which was located by Robert Mattey on May 1, 1961; that no proceedings have been instituted since May 1961 to contest the claim; and that the alleged valuable mineral was an uncommon variety of fire clay (R. 152-153). The court concluded (1) that it has no jurisdiction to determine the right of defendants to occupy the claim until final administrative decision after hearing under the Administrative Procedure Act and (2) that, until the mining claim is finally adjudicated as invalid, defendants are in lawful possession "and are entitled to be free from obstruction, resistance and interference by the United States, its agents, officers and employees" (R. 153). This appeal followed from the judgment which dismissed the complaint and also the answer and counterclaim and motion to amend the answer (R. 157-161).

SPECIFICATION OF ERRORS

The district court erred:

1. In dismissing the action.

2. In granting defendants' motion for summary judgment.

3. In finding that defendants are in possession of the Grape Vine Placer Mining Claim.

4. In finding that such claim was located on May 1, 1961.

5. In concluding that the court has no jurisdiction to determine the right of the defendants to occupy the Grape Vine Placer Mining Claim.

6. In concluding that, until said claim is finally adjudicated to be invalid, defendants are lawfully in possession and occupation of the Grape Vine Placer Mining Claim.

7. In denying all relief to the United States.

SUMMARY OF ARGUMENT

The holding that the district court lacked jurisdiction of this case because the Department of the Interior had not adjudicated the 1961 mining claim to be invalid was plainly erroneous for three independent reasons.

A. This Court, in Kennedy v. United States, 119 F.2d 564 (1941), sustained the right of the United States to secure an adjudication of its right to possession of public domain and, in that connection, to adjudge a stock-raising homestead entry to be invalid, and the same result has been reached in mining claims cases. Best v. Humboldt Mining Co., 371 U.S. 334 (1963), does not hold otherwise. It merely concludes that the institution of condemnation proceedings did not preclude the Department of the Interior from exercising its normal jurisdiction. To preclude court action in the present case could, without just cause, permit the use of repeated mining claims to delay indefinitely continued illegal possession of federal property. Also, it would require separate treatment by the courts and by the Department of different aspects of the same single transaction.

B. A mining claim not filed and occupied for the bona fide purpose and intention of developing a profitable mine is void and, consequently, no defense to a trespass action. The facts of this case clearly demonstrate that the continued occupation by defendants is of this nature and,

hence, is no defense to this action. Congress has recently taken action to enforce a policy of preventing abuse of the mining laws by use of claims for other than mining purposes.

C. Even if the 1961 mining claim were valid, it would justify occupation of the public land only for mining purposes. Congress has specifically so provided in the 1955 statute. Occupation for a permanent residence is clearly illegal and relief prohibiting continuation of such illegal action and damages for past trespasses cannot properly be denied.

ARGUMENT

THE MERE ASSERTION OF RIGHTS UNDER THE PURPORTED 1961 MINING LOCATION DID NOT BAR THE UNITED STATES FROM SECURING JUDICIAL RELIEF AGAINST ILLEGAL OCCUPATION OF ITS LANDS

There can, of course, be no question as to the jurisdiction of a federal court over a suit brought by the United States. And no question is raised here as to jurisdiction over the persons of the defendants. Moreover, since defendants' answer and counterclaim were dismissed, this appeal is not concerned with the alleged rights asserted by defendants in their

answer and counterclaim based on the 1962 statute.[2/] Nor is any issue here presented as to the attempted attack by the Fourth Affirmative Defense on the Interior Department decision of 1960 holding the original Mattey claim to be invalid. For purposes of this appeal, that decision must be treated as conclusive. The court, of course, does not have authority to refuse to grant the United States injunctive relief or damages if trespass upon the public lands is shown. United States v. Langendorf, 322 F.2d 25 (C.A. 9, 1963); United States v. Hosteen Tse-Kesi, 191 F.2d 518 (C.A. 10, 1951). The sole question is, thus, whether the mere assertion of the 1961 mining claim precludes the United States from securing any judicial relief without first following the administrative process of contest, hearings and appeals. We submit that such remedy is not exclusive, especially on the facts of this case.

2/ That assertion is contradictory to the theory that the Grape Vine Mining Claim is valid, because it only applies when the Secretary has declared a mining claim to be invalid or where an occupant relinquishes all rights he may have under the claim.

A. The existence of a purported mining claim does not preclude resort by the United States to the courts to secure possession of its property. - In Kennedy v. United States, 119 F.2d 564 (C.A. 9, 1941), the defendant was enjoined from grazing livestock on land in Arizona. He claimed to have made an entry under the stock-raising homsestead laws. On appeal, he attacked the trial court's jurisdiction on the ground that "the issue of the case lies solely within the jurisdiction of the Land Department of the Federal Government * * *" (p. 565). This Court rejected the argument and affirmed the judgment, saying (p. 565):

> The Government considered Kennedy as a mere trespasser, and appellant sought unsuccessfully to establish that he was more than a trespasser because of some right as a settlor upon the lands, the subject matter of the action. We think Judge Bourquin put the matter well and as succinctly as we could do it in the case of United States v. Schultz, D.C. Cal. 1929, 31 F.2d 764: "The courts are always open to private litigants to determine possessory rights in public land. Gauthier v. Morrison, 232 U.S. [452] 461, 34 S.Ct. 384, 58 L.Ed. 680. Not to determine title, however, because they have not title. But the United States having title, the tribunals are always open to it to vindicate its rights therein, either that of the Land Department or that of the courts, at its election if proceedings are initiated by it. See United States v. Sherman [8 Cir.] 288 F. 497."

The Schultz case, which, like this one, sought an injunction against occupation of national forest lands where the defendant relied upon mining locations, further stated (p. 764): "In general, the courts are open to the United States, and no statute closes them to it in matters of public land other than transfer of title." The same result was reached in United States v. Toole, 224 F.Supp. 440 (D. Mont. 1963).

Best v. Humboldt Mining Co., 371 U.S. 334 (1963), does not overrule the Kennedy line of cases. It simply held that the institution of condemnation proceedings did not preclude the Department of the Interior from exercising its normal authority to adjudicate the validity of mining claims. We recognize this as the appropriate general practice. But Best does not say that the United States is thereby precluded from submitting the question to the courts in cases where such action is deemed appropriate.[3/] It simply holds (371 U.S. at p. 340): "The United States is not foreclosed from insisting

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3/ The Kennedy and Schultz cases were called to the attention of the Supreme Court in the petitioner's brief in Best, with the explanation: "There are cases where in a suit to quiet title by the United States or to eject trespassers from public lands, the courts have, as part of the general issue, determined whether there has been a valid mineral discovery [citations]. We have found no case where such a determination has been made by a court at the request of a claimant and over the objection of the United States."

on resort to the administrative proceedings for a determination of the validity of those claims."

The Court does not indicate in Best that the United States is foreclosed from seeking relief in the courts without an administrative determination. The consequences of such a restrictive interpretation of the Best opinion argue against that result. The administrative process of contest, hearings and appeals necessarily is time-consuming. Best emphasizes, in footnote 8, the large volume of work that must be processed by a limited number of hearing examiners. Thereafter, review by the district courts, followed by appeals, is available.[4/] A purported location and discovery can be made with a minimum expenditure of money, time and effort, as in this case. Because of the delays incident to the administrative proceedings and court review thereof, such a view would open the door to use of such process to continue illegal possession of the public domain for years. Because of the almost unlimited number

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4/ The claimant has a choice of the district court where a defendant resides (i.e., the District of Columbia, the residence of the Secretary of the Interior), where the plaintiff resides, or where the property is situated. 28 U.S.C. sec. 1391(e).

of claims that could be asserted under the term "minerals," it would be difficult for the administrative rejections ever to catch up with the claims asserted. The 1961 assertion that "fire clay" is something different and a new discovery, as compared to the original Mattey claim, well illustrates the possibilities.[5/]

The reading of Best as a limitation would also require separate treatment of different issues which arise out of the same events and depend upon substantially the same evidence. In Point B, infra, we show that a purported mining discovery, where the location is not made and occupation continued for a bona fide purpose of mineral development is void

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5/ In opposing the motion for summary judgment, the United States filed the statement of Emmett B. Ball, Jr., Zone Mining Engineer, that (R. 121):

> On March 25, 1966 I, Emmett B. Ball Jr. did talk to Maria Nogueira at her residence concerning a red clay find. Miss Nogueira pointed out to me the area of red clay occurrence. This red material was observed by me and found to be of no consequence as the material is less than one foot thick and is exposed over a very few square feet. Even though the red material occurred in large quantities, its uses would be for common red brick and the like.
>
> There appears to have been no mining activity on the Grape Vine Placer claim since my first visit to the claim September 11, 1962.

and could not constitute a defense to this action for possession. In Point C, infra, we show that, even assuming the 1961 mining location to be valid, defendants were not thereby authorized to occupy the property simply for personal residence purposes. These aspects of the basic controversy will necessarily have to be adjudicated by the court. It would be duplication of effort and wasteful to preclude the court in such circumstances from adjudicating the entire matter.

B. The 1961 purported discovery is no defense to this action if it was not a bona fide location made for the purpose of mineral development. Bagg v. New Jersey Loan Company, 88 Ariz. 182, 354 P.2d 40 (1960), recently declared (354 P.2d at p. 45):

> It is axiomatic that a locator must act in good faith. * * *
>
> No citation of authority is required to support the statement that the all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country. Consequently, title to mineral lands cannot be acquired by occupancy unless for the prime purpose of mining or extracting minerals. Burns v. Clark, 133 Cal. 634, 66 P. 12; Tit. 30 U.S.C.A. § 22. We therefore hold that an attempted location for any other purpose than that thus specified, is wholly void.

United States v. Ickes, 98 F.2d 271 (C.A. D.C. 1938) cert. den., 305 U.S. 619, declared (at p. 279) that the genera policy of mining laws of the United States "has been to promot widespread development of mineral deposits and to afford minin opportunities to as many persons as possible." The Act of July 25, 1955, 69 Stat. 368, 30 U.S.C. sec. 612, expressed the policy to confine use of mining claims to mining purposes and was directed at abuses which had grown up in the use of such claims for other than mining purposes. One of the abuses specifically referred to was the acquisition of mining claims for "residence and summer camp purposes." H. Rept. No. 730, 84th Cong., 1st sess. (1955), p. 6; S. Rept. No. 544, 84th Cong., 1st sess. (1955). At the hearings, speaking for the American Mining Congress, Mr. Raymond B. Holbrook stated (Hearings, S. Comm. on Interior and Insular Affairs on S. 1713 84th Cong., 1st sess. (1955), p. 16):

> That organization and its membership have been very much concerned about the problem of mining locations which have been attempted for a purpose other than the recovery of minerals. The purpose may be an attempt to control the timber on the land, or a choice site for a summer cabin, or an area which may have nuisance value. Such locations fall into two categories:

(1) Clearly invalid mining locations, unsupported by any semblance of discovery, and

(2) Mining locations having mineral disclosures which might satisfy the basic requirement of discovery, but which were in fact made for a purpose other than mining.

I think it is generally known that the mining industry has never condoned the making of such locations and, on the contrary, has urged the use of available procedure to defeat them.

Representative Clair Engle stated (101 Cong. Rec. 8743, 84th Cong., 1st sess. (1955)):[6/]

There have been recurring instances of abuse of these mining laws in recent years due to the filing of mining claims for the purpose of establishing fishing camps and recreational resorts of various types on public-domain land, and there has been a growing and continuing conflict in the use of the surface of the public-land areas between the mine claimants, the livestock people, those interested in recreation, fish and wildlife, and the lumber handlers.

As a consequence of all of that, it has become increasingly apparent to us that it would be necessary to enact legislation eliminating the filing of phony mining claims which are a real abuse of the mining laws and which the mining industry gives no support whatever.

6/ This congressional purpose was even more clearly spelled out in connection with the Act of October 23, 1962, Pub. L. 87-851. See, e.g., 108 Cong. Rec. 19646-19647, 87th Cong., 1st sess. (1962).

In the present case, the locator, Robert Mattey, has admitted that the purported location was not for the purpose of exploring for and developing the mineral (supra, p. 4). It is equally clear that the Nogueiras entered upon and continued to occupy the premises simply for personal residence purposes and not for mining development at all. This is precisely the kind of misuse of the mining laws condemned by Congress and by the courts, supra.

C. The United States is entitled to prohibition of further occupation of the land for other than mining purposes and for damages for past trespass, even if the 1961 mining claim is valid. - While the right of a mining claimant under a valid discovery has been said to be that of exclusive possession, such possession can be maintained against the United States only for mining purposes. In United States v. Rizzinelli, 182 Fed. 675 (D. Idaho 1910), Judge Dietrich spelled out in detail (pp. 680-684) the reasons why the right of the locator to "the exclusive right of possession and enjoyment" under R.S. 2322, 30 U.S.C. sec. 26, "is limited to uses incident to mining operations * * *," following Teller v. United States, 113 Fed. 273 (C.A. 8, 1901). Consequently,

Rizzinelli sustained convictions for maintaining saloons on mining claims in a national forest in violation of regulations of the Secretary of Agriculture, and Teller sustained a criminal conviction for cutting timber on a mining claim for purposes of sale. In Teller, the court said (113 Fed. at p. 281) that the mining claim "did not devest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste." These principles were followed more recently in United States v. Etcheverry, 230 F.2d 192, 195 (C.A. 10, 1956), saying: "We construe these cases to hold that the exclusive possession of the surface of the land to which the locator is entitled is limited to use for mining purposes."

Because of the widespread abuses, Congress expressly provided in the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. sec. 612, that mining claims thereafter located should not be used for other than mining purposes, and a procedure was established for federal management of the surface subject to the miner's rights. Thus, both decisions for many decades and specific declarations of Congress show that the court's second conclusion of law (R. 153) is plainly wrong. By their own

insistence that the land is their permanent residence, as well as their admission that they have never conducted any mining activities on the premises, the Nogueiras have admitted that they illegally occupy the premises. There is no warrant for refusing ejectment and damage for such trespass. 7/ In this aspect, the alleged necessity for administrative adjudication of the validity of the 1961 mining claim has nothing to do with the case and cannot justify dismissal of the complaint.

CONCLUSION

It is submitted that the judgment of dismissal should be reversed with directions to order ejectment of the defendants and the award of trespass damages.

Respectfully,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WM. MATTHEW BYRNE, JR.,
United States Attorney,
Los Angeles, California 90012.

ERNESTINE TOLIN,
Assistant United States Attorney,
Los Angeles, California 90012.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C. 20530.

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7/ The mining law (R.S. 910), 30 U.S.C. sec. 53, specifically provides that the fact of paramount title in the United States does not effect court jurisdiction over possessory actio as to mining claims. Moreover, the Department of the Interior has neither powers nor enforcement means of possessory action.

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROGER P. MARQUIS
Attorney, Department of Justice
Washington, D. C. 20530